There will therefore be judgment for the Plaintiff in the sum of US$24,290.32 and there will be interest payable at 10% on the said sum from date of issue of Writ to date of Judgment *i.e.* today, March 21, 1985. Costs of the proceedings to the Plaintiff.

Claim allowed.

Solicitors : *Karan Nair & Co.; Wee Swee Teow & Co.*

MALAYSIAN REPORTS

LAM KONG CO. LTD. v. THONG GUAN CO. (PTE.) LTD.

[S.C. (Abdul Hamid C.J. (Malaya), Wan Suleiman & Seah S.C.JJ.)
March 12 & May 19, 1985]

[Johor Bahru – Federal Court Civil Appeal No. 186 of 1984]

Practice and Procedure – Claim for specific performance – Non-appearance of defendant – Whether judgment in default can be entered – R.S.C. 1957, O.13 r. 12, O. 14A & O. 70.

The respondent in this case had brought an action for specific performance of a contract for the sale of land against the appellant. The writ was served outside jurisdiction and as the appellants did not appear to the writ judgment in default was entered by the Senior Assistant Registrar. The appellants applied to set aside the judgment in default. The application was dismissed in the High Court and the appellants appealed.

Held: (1) in the light of Order 13 rule 12 of the Rules of the Supreme Court, 1957, it seems clear that if the writ is specially indorsed, as in this case, then the plaintiffs are to proceed with the action as if the defendants had appeared. The respondents in this case are therefore precluded from entering default judgment against the appellants;

(2) the breach and the non-compliance with the rules in this case were not mere irregularities but fundamental defects. The fundamental defect was not curable as the effect of the breach and non-compliance was to defeat the right of the other party to the action;

(3) there was no unreasonable delay by the appellants in this case, as they took steps to apply to set aside the judgment in default as soon as they became aware of it;

(4) although the order had been perfected in this case and the land had been transferred to the respondents and registered the court was not precluded from exercising its inherent power to set aside the default judgment if it decided that the respondents were disentitled to the order.

Case referred to :

(1) *Re Harrison's Share under a Settlement* [1954] 2 All E.R. 453.

SUPREME COURT.

Upali Masacorale (*Lim Cheun Ren* with him) for the appellant.

Gan Kim Sing for the respondents.

Cur. Adv. Vult.

Abdul Hamid C.J. (Malaya) (delivering the Judgment of the Court): This is an appeal against

the decision of Yusoff Mohamed J. in the High Court, Johor Bahru dismissing an application to set aside the judgment in default of appearance entered against the appellants on January 14, 1980.

Judgment in default was entered in respect of a claim by the respondent, Thong Guan Company (Pte) Limited:

(a) for the delivery by the appellants all the issue documents of title to the said 26 building lots. Lots 260 to 265; 269 to 283 and 296 to 300 known as Lam Kong Estate, Jalan Pandan, Johore Bahru, being part of land comprised in Johore Malay Lease No. 73 Lot 142 as described above (now known as Lots 2505; 2461 to 2465; 2490 to 2495; 2497 to 2502; 2506 to 2513, in the Mukim of Tebrau, District of Johore Bahru).

(b) to execute and deliver 26 valid and registrable transfers of the said 26 building lots in favour of the Plaintiffs so as to enable the Plaintiffs to complete the transfers and to submit building plans and to erect the buildings on the said lots.

The service of the Writ was effected by the Process Server of the Supreme Court, Singapore by leaving a copy of the same at the place No. 256, Middle Road, Singapore purportedly the registered office of the appellants. Order for service out of jurisdiction was obtained on September 19, 1979 and judgment in default was entered on the date mentioned above by the Senior Assistant Registrar, High Court, Johor Bahru, the appellants not having appeared to the Writ of Summons.

It is the appellants' contention that the judgment in default was entered wrongly as

(1) there was no proper service on the company; and

(2) the judgment sought for was in respect of a claim for specific performance.

For the purpose of this appeal it will suffice if we deal only with the second issue which is the central issue. The question is whether a judgment in default could be entered against the appellants in respect of a claim for specific performance. The relevant rules applicable at the material time were the Rules of the Supreme Court, 1957 (R.S.C. 1957). Order 13 rule 12 of the R.S.C. 1957 provides that:

> "In all actions not by the rules of this Order otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, and if the writ is not specially indorsed under Order 3, Rule 6, of a statement of claim, the action may proceed as if such party had appeared, subject, as to actions where an account is claimed, to the provisions of Order 15."

In the light of rule 12 Order 13 it seems clear that if the writ is specially indorsed, which it is in this case (see Order 13 rule 6), then the plaintiffs are to proceed with the action as if the defendants had appeared. Order 13 rule 12 of the R.S.C. 1957 is substantially similar to Order 13 rule 6 of the Rules of the Supreme Court, 1965 (English Rules) the effect of which is stated in the *Supreme Court Practice 1979 (White Book)* Volume 1 at p.125 as follows:

> "The effect of para. (1) of Rule 6 is to preclude a plaintiff from entering judgment in default of appearance in every case in which the indorsement on the writ contains or includes a claim which is not squarely within Rules 1 to 4 of this Order, and to require him to proceed with the action as if that defendant had appeared. If, therefore, there is indorsed on the writ a claim for an account, injunction, specific performance, declaration or rectification or other remedy or relief which falls outside the descriptions specified in Rules 1 – 4, the plaintiff cannot enter judgment in default of appearance, unless he expressly and finally abandons every such remedy or relief."

The instant case seems to come squarely within the ambit of Order 13 rule 12 of the R.S.C. 1957 as clearly the writ filed by the respondents was a specially indorsed writ for specific performance and the respondents had not abandoned the relief sought. Order 13 rule 12 is explicit in that in such a case the plaintiffs are to proceed with the action as though the defendants had appeared. In view of rule 12, therefore, the respondents ought to have been precluded from entering default judgment against the appellants. The next step for the respondents to take, indeed what the respondents ought to have done, is to set down the action on motion for judgment. At the hearing of the Motion the Court would have to consider judgment as upon the statement of claim the Court or the Judge should consider the plaintiff to be entitled. (See Order 27 rule 11 of the R.S.C. 1957.)

In this regard it is significant to note that there are specific provisions in the R.S.C. 1957 under Order 14A dealing with summary judgment in actions for specific performance. Order 14A reads –

> "In any action commenced by writ of summons indorsed with a claim for specific performance of an agreement,

whether in writing or not, for the sale or purchase of property, with or without alternative claims for damages,... the plaintiff may (whether the defendant has appeared or not), on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and stating that in his belief there is no defence to the action, apply to the Court or a Judge for judgment and the Court or Judge may thereupon give judgment in the action unless the defendant by affidavit, or by his own viva voce evidence or otherwise, satisfies the Court or Judge that he has a good defence to the action on the merits, or discloses facts sufficient, in the opinion of the Court or Judge, to entitle him to defend."

Counsel for the appellants submitted that the non-compliance in the instant case constituted a fundamental defect and not a mere irregularity. And that being so the defect was not curable. Counsel for the respondents, however, argued that in the light of Order 70, which was in force at the relevant time, the non-compliance with any of the rules ought not to have rendered the proceedings void unless the Court or a Judge had otherwise directed. Rule 70 of the R.S.C. 1957 applied only to cases in which there was non-compliance of any provisions of these rules or other rules of practice. In this regard a distinction has to be drawn between an irregularity and a nullity. It is not important today as the distinction is now discarded under the new Rules of the High Court. For this reason we consider the effect of such non-compliance only for purposes of this appeal.

It is to be observed that the effect of the rule was to disentitle the respondents from entering default judgment on a writ specially indorsed for specific performance. They were to proceed in the manner provided by the Rules and that was to set down the action on motion for judgment. It was only on the further step being taken that it was open for the Court or Judge to consider giving judgment as upon the claim the Court or Judge should consider the respondents to be entitled. At that point of time therefore judgment in default was not only given in breach of rule 12 but had resulted in a failure to comply with rule 11 of Order 27. In the circumstances we are constrained to hold that the breach and the non-compliance were not merely irregularities but fundamental defects. The fundamental defect was not, in our view, curable as the effect of the breach and non-compliance was to defeat the right of the other party to the action.

It was provided under Order 70 rule 2 that "an application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity."

As can be seen, there was no unreasonable delay. The appellants clearly took steps to apply to set aside the judgment in default as soon as they became aware of it. For this reason, we form the view that they had made the application within a reasonable time.

Finally, we refer to the respondents' contention that since the order had been perfected, it was therefore too late to set aside the default judgment. Counsel pointed out that the land had been transferred to the respondents and registered.

We do not see the merit in the argument for, in our view, this could only apply to the Court below when a party seeks to set aside an order which has been perfected and completed. In that event the Court may be precluded from doing so as the jurisdiction of the Judge over it has come to an end. (See *Re Harrison's Share Under A Settlement.*)[1] This Court however is not precluded from exercising its inherent power to set aside a default judgment if it should decide that respondents were disentitled to the order.

For these reasons we would allow the appeal and set aside the order for judgment in default. Further proceedings would follow as if the appellants had appeared to the writ. Costs to the appellants. Deposit to be refunded to the appellants.

Appeal allowed.

Solicitors: *Lim & Teng; Gan & Lim.*

AHMAD NORDIN BIN HAJI MASLAN & ANOR. v. ENG NGAK HUA & ORS.

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C. JJ.) October 30, 1984 & May 31, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 125 of 1984]

Tort – Negligence – Lorry left unlighted on dark road – Motor car crashing into rear of lorry – Liability – Damages.

The first appellant in this case was the driver of a lorry fully laden with padi. While driving the lights of the lorry